RANSOM PAYNE, Appellant,

vs.

W. S. ROBERTSON, et al., Appellees.

No. 36.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

BRIEF OF APPELLANT.

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IN THE

Supreme Court of the United States.

October Term, 1897.

RANSOM PAYNE, Appellant,

vs.

W. S. ROBERTSON, et al., Appellees.

No. 20.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

BRIEF OF APPELLANT.

THE CASE STATED.

The appellant sued the appellees in equity in the first judicial district court, sitting within and for Logan County, Oklahoma, for the March term, 1892, of said court, setting forth substantially the following facts in his complaint:

That plaintiff is a citizen of the United States and a resident of Logan County, in Oklahoma Territory; that prior to March 2 and to April 22, 1889, he had been appointed and duly qualified a U. S. deputy marshal for the district of Kansas, to which district that portion of Indian Territory now known as Oklahoma, was attached for judicial purposes; that after the passage of

the act of March 2, 1889, providing for the opening of certain Oklahoma lands, and after the issuance of the President's proclamation of March 23, 1889, fixing the date for opening said lands, plaintiff was ordered by the U. S. Marshal for said judicial district of Kansas, his superior officer, to go to the locality of the U. S. land office at Guthrie, Okla., and in obedience to said order of his superior officer and in the discharge of his duty as deputy marshal he did go to Guthrie and at noon of April 22, 1889, was at or near the U. S. land office at that point for the purpose of maintaining peace. Plaintiff, being so at Guthrie in discharge of his official duty and being duly qualified to take a homestead under the land laws of the United States, did, after 12 o'clock, noon, of said day, go upon a certain quarter section (described in complaint) and make settlement thereon as his homestead, and on the next day, April 23, 1889, made H. E. No. 4, Guthrie series, for the same, paying the legal fees and commissions, $14.00, and receiving the proper duplicate receipt, a copy of which is made an exhibit. (Record, p. 9.) That plaintiff complied with the requirements of the homestead law in the matter of improving said land and residing thereon; that he had not previously entered upon and occupied any part of the lands opened to settlement on April 22, 1889, except as stated already; that prior to April 22, 1889, inquiry had been made of the Commissioner of the General Land Office, on behalf of persons situated as was plaintiff in said Territory, as to whether their remaining in said Territory would, in any way, interfere with their taking homesteads therein, and the said Commissioner, in reply, prepared a letter addressed to Hon. John J. Ingalls, then a United States Senator, in which it was stated that persons discharging the duties of official

positions in said Territory would not be disqualified from taking homesteads; that this letter was approved by the Secretary of the Interior before being sent to its address, and it and other similar opinions were embodied in a circular of instructions and information, which circular was widely circulated and published prior to April 22, 1889, for the information of the public and of such officers as plaintiff. It is further alleged that the Secretary of the Interior, himself, gave personal assurance with regard to a deputy marshal, that he would not be regarded as disqualified. Relying on these opinions and assurances, plaintiff remained in said Territory and made homestead settlement and entry, as aforesaid, in entire good faith.

That after his said settlement was made and his rights had attached to the land, various other persons went upon said quarter, although notified of plaintiff's claim, among them being the defendant Fitzgerald, who asserted a homestead right to said quarter, and numerous other parties who, over plaintiff's protest, staked out a large part of said land as a town site; that on May 9, 1889, and at other times, contests were initiated against plaintiff's said entry, resulting in a hearing before the local land officers, and, upon successive appeals, in a decision by the Secretary of the Interior canceling his said entry, the Secretary in his said decision having made the following finding of facts in reference to plaintiff's acts in the premises:

"Ransom Payne made homestead entry for the N.W. ¼ of section nine (9) on April 23rd, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2nd, 1889 (16 C. L. O., 10, 11), providing for the opening of the Territory of Oklahoma to settlement, and prior to

the proclamation of the President fixing the day of said opening, and he entered said Territory prior to April 22nd, and was there at noon of that day, in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock, noon, of April 22nd he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement."

Plaintiff further alleges that the Secretary of the Interior, in canceling his entry, misconstrued the provision of the act of March 2, 1889, opening said lands, which reads as follows, to wit:

"And provided further, That each entry shall be in a square form as near as practicable, and no person shall be permitted to enter more than one quarter section thereof; but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

And that the Secretary misconstrued the language used in the President's proclamation, and that he misapplied the law to the facts found by him, and that upon the facts it should have been held that plaintiff was a qualified homesteader.

Plaintiff further shows that after the cancellation of his entry, the defendants, Robertson, Foster, and

Schnell, were appointed a special town site board to enter said land in trust for the inhabitants of the so-called town of East Guthrie, and to make deeds to the same, and that they obtained a final certificate and patent for said land; that at the time and place where they had given notice that they would make town site proof, plaintiff appeared and protested against the same, and himself made and tendered homestead proof under Sec. 21 of the act of May 21, 1890, relating to Oklahoma, and tendered $200, lawful money, in payment therefor, which proof and payment were rejected by the local officers. Copies of said proof and accompanying papers are attached as exhibits. (Record, pp. 10 to 19.)

That plaintiff has done all things required by law to entitle him to a patent for said land, and that but for the Secretary's error in construing the law, patent would have issued to plaintiff instead of to said defendants; that the defendants acquired the title to said land subject to the equitable rights of plaintiff, who is the equitable owner of said land, he having been the first settler on the land, and there having been no town site claimants thereon at the time of his settlement. He alleges the value of the land to be $10,000; that it is no part of the 320 acres upon which the town of Guthrie was built and on which the U. S. land office is located, and was not in any manner reserved. He asks that defendants be restrained from conveying said land to the various intruders who claim the same as a town site and that the legal title be vested in him.

The defendants, the town site trustees, demurred to the complaint on five grounds. (Record, pp. 19 to 21.) Demurrer was sustained and judgment rendered against plaintiff. (Record, p. 21.)

Plaintiff appealed to the supreme court of the Terri-

tory, where the decision of the district court was affirmed. (Record, p. 27.) Hence the appeal to this court.

In the judgment of the Oklahoma supreme court, from which the present appeal is taken, it is shown that the decision of the district court, on the demurrer, was upon the "question of the qualification of appellant as a homestead entryman, under the act of Congress of March 2, 1889," and the supreme court sustains the action of the lower court upon that one ground alone. This was the only question before the territorial supreme court. (Record, p. 27.)

In his six assignments of error, on appeal here, Payne, in various forms, alleges error in sustaining the demurrer to his complaint and in holding that he was not qualified to enter the lands involved as a homestead. (Record, pp. 28, 29.) It will not be deemed necessary to discuss each assignment separately, as what we shall say will apply equally to all.

THE LAW INVOLVED.

By sections 12 and 13 of the Indian appropriation act for the year ending June 30, 1890, approved March 2, 1889 (25 Stats., 1004), provision was made for the opening to settlement and entry of the Seminole Indian lands in the portion of Indian Territory now within Oklahoma Territory. Sec. 13 provides particularly for the disposal of the lands "under the homestead laws only, except as herein otherwise provided." Among the provisions of said section is the folowing clause:

* * * "But until said lands are opened for settlement by proclamation of the President, no per-

son shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any rights thereto."

It was held by the Secretary of the Interior that Payne was within the inhibition of the above clause and therefore disqualified. This decision was rendered in the case of The Town Site of Guthrie vs. Paine et al., June 22, 1891, and is reported in full in the official reports of the Secretary's decisions, 12 L. D., 653. After finding the facts as to Payne, as above quoted from the complaint in the case, the Secretary states his conclusions of law as follows:

"In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens and claimants on an absolute equality, so far as fixing the time when a claim to land could be aserted, and when the initiatory steps toward asserting such claim could be taken. To hold that deputy marshals, trainmen, and others who happened to be within the limits of the Territory in the discharge of their duties and in receipt of the salary and emoluments of their position at the moment the lands were open to settlement could take advantage of that fact and in advance of others immediately enter upon desirable tracts to the exclusion of those who had in obedience to law remained outside of the Territory would be a violation of the clearly expressed intention and spirit of the act. In my opinion such an interpretation is too unjust to be entertained. The facts in relation to the opening of this country were known to all. Parties who occupied positions similar

to that occupied by Payne had abundant opportunity to qualify themselves as claimants by withdrawing from the Territory and placing themselves on a par with others had they so desired. This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he cannot be permitted to do under the law. Had Payne declined to make any act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed, and a different rule might have been applied in the consideration of this claim, but under the present state of facts, there is neither equity nor law on his side, and your decision canceling his entry is affirmed."

It is this view of the law that we controvert.

The case at bar is the second "sooner" case from Oklahoma, the first being the case of Smith vs. Townsend, 148 U. S., 490, which should be distinguished from the present case.

The single legal question presented by the appeal is, Was a citizen who was required by his official duties to be within the limits of Oklahoma on the day of opening disqualified from making homestead entry under the clause quoted from the act of 1889, by reason of being at his post of duty, he being otherwise, in all respects, duly qualified?

ARGUMENT.

I.

In the first place, the homestead privilege is a valuable beneficial grant to each American citizen. It was

given by the Government as an inducement to its citizens to go upon the unsettled public domain and develop the same, reduce the wild lands to a state of productiveness and thus increase the general store of agricultural products necessary to supply the nation with food. The homestead law is a beneficial statute and is to be liberally construed. It is so held by this court. In Clements vs. Warner, 24 How., 394 (at p. 397), it was said:

"The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

And in Ard vs. Brandon, 156 U. S., 537, the court, speaking by Mr. Justice Brewer, after having said, "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon," proceeded as follows (op. at p. 544):

"Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

The demurrer, in the case at bar, admits the facts pleaded by Payne. It admits his qualification, in all respects, under the homestead law and that the Secretary of the Interior had found him to be qualified, after a hearing had, except as to this one feature of "sooner-ism." He, therefore, is entitled to the tender dealing

spoken of in Ard vs. Brandon, *supra*, and the law is to be liberally construed in his favor, unless he forfeited his right to its protection.

The issue here is purely one of statutory construction. There is no suggestion of fraud on Payne's part nor of any attempt by him to do an overt act which, of itself, would deprive him of the homestead privilege in Oklahoma. If he is disqualified it is because of the necessary construction of the statute and not because of any unlawful act done by him. We submit that before it can be held that he forfeited his homestead privilege on April 22, 1889, it must clearly and affirmatively appear that the statute, itself, declares such forfeiture. Forfeitures are odious in the eyes of the law and are never presumed nor sought for.

II.

What is the exact meaning of the inhibition in Sec. 13 of the act of 1889? What is it that operates as a disqualifying circumstance? The precise act is expressly mentioned by Congress and the language cannot, therefore, be extended by implication to embrace a broader class of acts. The first clause of the inhibiting section declares that no one "shall be permitted to enter upon and occupy" the lands to be opened until the time fixed by the President. Then follows the exact action which is declared to be a perpetual bar to homestead entry as against those affected by it, viz: "and no person *violating* this provision shall ever be permitted to enter any of said lands or acquire any right thereto." The exact thing, then, that disqualifies, is some act which amounts to a *violation* of the law against entering and occupying. It has been assumed that the mere fact of presence within the Territory at the hour of

opening is, in itself, a violation of the law, without regard to the character or occasion of the presence; but this involves a palpable inconsistency. It is conceded that Payne was not only lawfully within the Territory, by permission, but that his *duty required* him to be there. To have been elsewhere would have been a violation of law. Payne was a sworn officer of the United States and by law required to obey the orders of his principal. It is said that he was at Guthrie *lawfully* on April 22, 1889, and, in the same breath, that he violated the law by being there. How is this possible? An act cannot be both lawful and unlawful at the same time.

Payne violated no law up to noon of the day of the opening of these lands. This seems to be conceded by the Secretary of the Interior. Indeed, he expressly says that if Payne had gone out of the Territory and come in at noon, or if he had waited until those at the line had had a chance to reach the same land, he would not have been disqualified, and, as we shall see presently, the Interior Department still holds the same way, even since Smith vs. Townsend was decided. If the inhibition quoted as disqualifying Payne was not violated prior to or at the hour of opening, nothing he could afterward do would violate it. As this court aptly said in Smith vs. Townsend, the wall around the Territory, erected by the act of 1889, fell down at noon of April 22, 1889, and there was no barrier to any one going where he pleased. If Payne was disqualified, therefore, the thing that disqualified him must have happened prior to that hour and the law is explicit in saying that a man that is disqualified under this act is forever disqualified. "Once a sooner, always a sooner," may well become a legal maxim in the law of Oklahoma.

Of course, the only action that can be held to disqualify Payne is the lawful action of discharging his duty, by obeying the U. S. Marshal and staying at Guthrie to protect the land officials and keep the peace in the great rush that was expected. Was this inhibition against entering and occupying the lands to be opened directed against public officials otherwise qualified, whose duties to the public could only be discharged by going within the territorial limits prior to the hour of opening? Is it to be assumed that Congress intended to declare that all public officers whose presence in the Territory at the hour of opening was absolutely necessary to the public good and to the success of the opening should by their very faithfulness to duty forfeit valuable rights as citizens? We do not believe it. In order to construe the statute we must consider the conditions and circumstances surrounding the opening of these lands. This is held in Smith vs.Townsend, *supra*, and we refer to the opinion in that case for a finding by this court of the conditions and circumstances surrounding these lands prior to the passage of the act of 1889. It appears from that finding that the mischief to be remedied by this legislation was the disposition on the part of a certain lawless element to intrude upon these lands, notwithstanding the fact that they were Indian lands and every white man who went upon them without express license violated the law. Not only that, but such intrusion was a violation of four successive proclamations by three successive Presidents of the United States. It was this defiance of law and Executive proclamation which was to be remedied, and it was the man who, in *violation* of law and proclamation, insisted upon entering upon and occupying these lands against whom the inhibition and the penalty were directed. They were not di-

rected against the law-abiding citizen who, because of his special fitness to serve the public, had been selected by the agents of the law to go ahead of settlers in order to protect public officials and keep the peace during the opening. They certainly were not directed against one whom the law invited and *compelled*, if he obeyed it, to be within the limits of the lands to be opened at the hour of opening. Again we say this statute was directed against violators of the law, not against the agents and upholders of the law.

If Payne comes within the general language of the statute, at all, his case should be held to be an exception to the general rule. It is well settled in the construction of statutes that a literal construction will not be enforced if it would carry the rule beyond the reason of the law, and especially where to do so will do an injustice. It is presumed that the legislature intended to make exceptions of such cases. This rule is stated much better than we can state it by Mr. Justice Field, in delivering the opinion of this court in United States vs. Kirby, 7 Wall., where it is said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The *reason* of the law in such cases should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'That whoever drew blood in the streets should be punished with the utmost severity' did not extend to the surgeon who opened the vein of

a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of Edward II., which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"

The same principle is recognized in Murray vs. Gibson, 15 How., 421, and Reiche vs. Smythe, 13 Wall., 162.

In the case at bar, before the district court, the demurrer to the complaint was argued before Hon. E. B. Green, then chief justice of the territorial supreme court, sitting as district judge. He filed a written opinion showing that but for the decision of the territorial supreme court in Smith vs. Townsend, he would have overruled the demurrer. The closing part of this opinion is as follows:

"In order to construe this act of Congress the question that lies at the very threshold is, 'What is the purpose of the act?' It was evidently to prohibit persons from coming into the Territory who were coming here for the purpose of locating on homesteads, or taking land as homestead settlers, before the time fixed for the opening. Could it have had any reference and did Congress intend that it should apply to an officer of the United States who was in the Territory in the discharge of his duties as such officer? Are these persons within the prohibition of this act? That is the question. If they are not, then they are not disqualified; if they are, then the fact of their being in before the time and between the 2d day of March and the 22d of April would absolutely disqualify them. We can not add to this act, nor can we take from it. We must consider it just as it is. If it applies to the whole world, then it applies to officers as well as private individuals.

If its passage was simply to prohibit persons from coming in who were coming here to select and locate upon homesteads, and who were not here to discharge official duties, then it does not apply and ought not to be made to apply to the officers of the Government who were in the Territory in the discharge of their official duties. Take the case of the general law, of which there are two instances given by Blackstone: One that he cites from Puffendorf; there was a law that provided that whoever drew blood upon the street should be subjected to a certain p alty. That was a law in its terms general, and excep no person, and yet it was conceded by all that it d not apply to a surgeon who had bled a man who had fallen down in a fit upon the street.

"There is another one. Take the case that is cited by Blackstone from Cicero or Herennius. There was a Bolognian law that whoever remained upon a ship, when subjected to perils from a storm, should be entitled to the ship and whatever property was upon the ship at the time. A ship was about to be wrecked and the whole crew and all persons left it except a sick man who was unable to leave. He remained upon the ship and it came safe to shore and he claimed it under the provisions of the act and it was universally conceded that he was not within—while he was within the letter of the act, he was not within the spirit of the act. That the purpose of the law was to encourage persons to remain on board and endeavor to save the ship—a person who could do something to save the ship and the property. Now these were former applications of the construction of statutes and of general laws. When we look at the intention of Congress in this act, the purpose of the act was to restrain persons from coming into this Territory who were coming here for the purpose of locating upon and occupying homesteads, from

coming here between the 2d day of March, 1889, and noon of the 22d of April, 1889, and it applies only to those persons and to no others. That was the purpose of the act, and while an officer may be within the letter of the law, yet, in order to disqualify him from taking a homestead, he must not only be within the letter of the act, but he must be within the spirit of the act. It is a very fair rule of construction of statutes that that which is within the letter of the act is not within the conditions of the act unless it is within the spirit of the act. Now, in order to disqualify this homestead entryman, the Secretary is compelled to hold that he was not disqualified by reason of his being here in the discharge of his official duties up to the 22d day of April, but that he disqualified himself by not going out and coming in. There is no act of Congress that required him to come out and come in. If he was not disqualified by being in, the act of Congress did not require the he should go out and come in. Then the other ground is, conceding that he is not disqualified, that he should have waited a reasonable time after 12 o'clock, noon, before settling upon this homestead. There is no provision of the law that requires that. I am very clear that this man is a qualified homestead entryman; but under the decision in the case of Smith vs. Townsend of the Supreme Court, which this court is required to follow, and this case is covered, in my judgment, by the ruling and the law as held there, and by virtue of that case, although I am satisfied that this man is a qualified entryman, I shall be compelled to sustain the demurrer and let this case go to the Supreme Court, where the court can pass upon it, and modify the case of Smith vs. Townsend, so as to give to this man the rights that he is clearly entitled to under the law, and but for that case I should overrule the demurrer and

let it go up and be passed upon by the Supreme Court. It can go upon a short record and be heard within a very short time."

Judge Green's reasoning is certainly sounder than that of the Secretary of the Interior, as quoted in the beginning of this argument. We call attention to the fact that the same judge who delivered the foregoing opinion also delivered the opinion of the Oklahoma supreme court in Smith vs. Townsend.

III.

What is the test of disqualification? The Interior Department has settled down into holding that it is simply a question of *advantage*. If a party was inside the closed territory, within the inhibited period, whether lawfully or unlawfully, but was outside at the hour of opening, it is held that if he gained no advantage or sought none by reason of such presence, he was not disqualified.

Sullivan vs. McPeek 17 L. D., 402.
Dean vs. Simmons, 17 L. D., 526.
Curnutt vs. Jones, 21 L. D., 40.
McMurray vs. Darbro, 21 L. D., 147.

In later cases, which are now the controlling precedents, the Secretary has held that presence in the Territory, even at the hour of opening, does not disqualify, under certain circumstances, distinguishing the case of Smith vs. Townsend, *supra*. We call attention to two of these decisions. The case of Jacob Kaufman, 21 L. D., 370, involved the question whether or not the homestead entry of a tract of land in Oklahoma by one Dunham was lawful. Dunham was within the lands opened on April 22, 1889, at noon, but was then a minor.

When he became of age he made an entry. His presence in the Territory at the hour of opening was not required by any official or public duty, and he was certainly within the letter of the law. Yet Secretary Smith, on precisely the same line of reasoning we have already pursued, held he was a qualified entryman. In other words, he held that an exception must be made to the general language of the statute. He said:

"It is not to be assumed that the law was directed against persons who, for other reasons, were disqualified from making entry—the obvious purpose of the act being to prohibit persons, otherwise qualified to enter land, from going into the Territory during the prohibited period. Dunham's presence on the right of way of the railroad on that day was not unlawful; he did nothing then or afterward to prejudice any other person's right; and in my opinion, his entry, made long subsequently, when he attained his majority, should be allowed to stand intact."

The case of Hershey vs. Bickford et al., 23 L. D., 522, decided by Secretary Francis, Dec. 23, 1896, goes still further. Bickford had been for a long time a resident of Leavenworth, Kan. He was an employee of the Indian Bureau as an inspector of flour, and was also a Government contractor. His duties required his presence in Oklahoma in April, 1889, and at the hour of opening these lands he was on the "Government acre" at the Kingfisher land office, just as Payne, in the case at bar, was on the "Government acre" at Guthrie. The Secretary quotes Smith vs. Townsend, but distinguishes Bickford's claim because of the fact that Bickford did not make entry until about two years after the opening, he having contested a prior entry in October,

1889, for the purpose of securing a preference right under Sec. 2, of the act of May 14, 1880 (21 Stats., 140). We ask that the Secretary's reasoning on pages 527 and 528 of his opinion be noted. It is too long to quote entire here. On p. 527 he says:

"Due consideration of the mischief which the law was designed to correct and of the reason of the remedy provided will not justify such an interpretation of it as would exclude Bickford from making a settlement nearly two years after the Territory was formally opened. His presence on the "Government acre" at the time of the opening secured to him no advantage whatsoever with respect to the settlement ultimately made by him. The equality of opportunity which it was the manifest purpose of the statute to secure to all settlers alike, is not in any degree impaired, imperiled, or involved by an entry made nearly two years after the formal opening. Assuming, therefore, that Bickford's case is within the letter of the statute, it falls without the spirit of it. The distinction between the letter and the spirit of the act was recognized by the Supreme Court in Smith vs. Townsend, and it is intimated that the spirit, rather than the letter, of the law should be adhered to."

It will be seen that he tries to reconcile his position with the ruling of this court in Smith vs. Townsend, but the reasoning is specious in the extreme. If Bickford was disqualified from making settlement at noon on April 22, 1889, he could not subsequently become qualified. The language found in the two acts of March 1 and 2, 1889, respectively, is quoted in the opinion. In the former act the inhibition is directed against "any person who may enter upon any part of said lands

prior to the time that the same are opened to settlement." In the latter act, applicable to the Seminole lands particularly, the language is, "*Until* said lands are opened * * * no person shall be permitted to enter," &c. In each the disqualifying act is something done *prior* to the hour of opening. If not disqualified prior to that hour, nothing that a man could do afterward would disqualify him. On the other hand, if something he had done prior to that hour rendered him disqualified *then*, nothing that he might afterward do or *refrain from doing* could restore the lost right. Congress expressly declares that "no person violating this provision shall *ever* be permitted to enter any of said lands." It was not said that persons inside the Territory at the hour of opening, if they waited until the next day, should not be disqualified. The attempt to distinguish Bickford's case from Smith vs. Townsend on the ground on which the Secretary bases it is a lamentable failure. This court said, in that case:

"The evident intent of Congress was, by this legislation, to put a wall around this entire Territory and disqualify from the right to acquire, under the homestead laws, any tract within its limits every one who was not outside of that wall on *April* 22."

Bickford was within "that wall" on April 22, and yet the Secretary says he is not included in the inhibition. We agree with his conclusion, but not with his logic.

The error in all this reasoning, in our judgment, is in saying, without qualification, that it is simply a question of *advantage*, and in holding that the man that had some advantage over others at the opening hour was disqualified. As is shown in the Bickford case, the Department does not follow its own rule. Bickford was inside the Territory at the hour of opening, pre-

cisely as Payne was, and possessed whatever advantage that fact might have given just as much as our client did. There is not a syllable in the language used by Congress that justifies the ruling to the effect that the inhibition is only against the man that seeks to use some advantage which his position at the hour of the opening may give him.

The advantage which the law sought to prevent was an *unlawful* advantage, one gained by the *violation* of the law previously in force against intrusion upon Indian lands and the special provisions against entering upon and occupying any of these lands prior to the opening. If there was no such unlawful entrance the law took no notice of any *advantage* otherwise obtained. It is said that the object of the law was to put all prospective settlers on a footing of equality. If such was its object, the means taken to accomplish it were totally inadequate. There was no equality of competitors on the day of opening. At the line, all around the territory to be opened, were men and women of all kinds, ages, races, colors, and conditions of life. There was the well-trained, lithe-limbed young man on a fleet race horse by the side of a one-legged veteran of the late war on foot. There was the cow boy on his cow pony, master of the prairie, by the side of the old farmer, with all he had in the world, including his wife and children, loaded in his old farm wagon, drawn by an ox team. Where was the equality? Where was the disqualification by reason of being possessed of an advantage? In that keen race for a quarter section of Uncle Sam's great domain it was not the humble, hard-working son of toil, who earnestly sought a real home for his family, that got the best land. It was the young man without encumbrance and with a fast horse that came out ahead. And why not? If he used no unfair

means, took no unlawful advantage, went nowhere that the law forbade, did only what the law commanded, why should he not be given the benefit of his superior opportunity? He *was* given the benefit of it.

Ransom Payne, it is said, had an advantage and used it, but it was not an *undue* advantage. It was not obtained by fraud, deceit, overreaching, treachery, breach of trust, or anything of the kind. If there was advantage in his position it was not of his seeking or obtaining. It was a mere unsought incident, a chance of fortune, due to his obedience to orders and the faithful discharge of duty. The Secretary says of him that he "declined" to go outside. This is scarcely fair. He was given no opportunity to go outside. He was commanded to stay *inside*. The law was not violated by his being where he was. It would have been violated, had he been elsewhere. The public welfare demanded that certain public officers should be present at the local land office to preserve the peace. Those whose duty it was to execute the law thought so at least, and, acting upon their judgment, stationed Payne at Guthrie for that purpose. Certainly, it will not be held that a man by faithful obedience to law and duty forfeits any of the rights given him by law in the absence of an express declaration to that effect. The policy of our Government is just the other way. It encourages faithfulness in the discharge of public duties. It does not cause a forfeiture of rights as a citizen to follow from a discharge of duty. For instance, in 1864, in order to prevent citizens who were in the army, thousands of miles from their homes and voting precincts, from losing their right of suffrage by reason of being at the place of duty, a plan was devised by which the soldiers in the field might cast their ballots in the

Presidential election and have their votes counted in their respective States.

It certainly was not the intention of Congress to put any obstacle in the way of securing the services of the best men as public officers in Oklahoma. The man who went into that Territory in advance of the opening of the lands for the purpose of being on hand to keep the peace, quell disorder, and overawe the reckless and lawless gangs of gamblers, sharpers, and ruffians generally that flocked to the place, had no easy time of it. He took his life in his hands, and the current history of Oklahoma records the death of many a brave man killed in the discharge of his duty as a *genuine* deputy marshal. The Government was eager to secure the service of such men as Payne before this opening, and the records of the Interior Department show that this very question was raised as to whether a citizen, otherwise qualified, would forfeit his right to enter a claim in Oklahoma if he accepted an appointment the duties of which would require his presence inside the country at the hour of opening. It is alleged in the petition, and admitted by demurrer, that an official opinion was given by the Commissioner of the General Land Office, approved by the Secretary, to the effect that such an officer would not forfeit his right of homestead. It is farther alleged that the case of a deputy marshal was submitted to the Secretary in person, who gave the strongest possible assurance that the party might safely accept appointment and that he would be protected in his rights. These opinions and assurances were published broadcast, and Payne alleges that he knew of them and relied upon them. If there is such a thing as estoppel against the United States we have here all the elements of a genuine estoppel. At any rate, we have a strong circumstance to prove the entire

good faith of this appellant and to show that there was no intent in his mind to violate the law.

The advantage that Payne is supposed to have had is chiefly imaginary. He was far in the interior of the country it is true, but there is no reason to suppose that the lands there were any better than those on the border. As a matter of fact, the records of the official survey of the township in which the land here involved lies, show that the quarter claimed by Payne was upland. It is on quite a hill and is far from being a desirable agricultural claim. He was limited to a narrow range in making his choice, because his official duties kept him close to the local office. He could not mount his horse and ride to a choice claim in some rich river bottom. Those gathered on the outside were free to go to points where the watercourses cross the lines whence they could, at the hour of opening, step across the lines or ride a greater or less distance, upon a rich and fertile claim, well watered and timbered. Payne could not do this. The advantage was more apparent than real.

IV.

But is not this case governed by Smith vs. Townsend, *supra*? If so, and if that case is to be adhered to in all the breadth of the general statements contained therein, then the decision appealed from must be affirmed. We believe, however, that the case at bar should be distinguished from that.

In Smith's case the facts were entirely different from Payne's case. Smith was an employee of the A. T. and S. F. Ry. Co., being a section hand, employed within the territory to be opened on April 22, 1889. He was living with his family in a tent, on the right of way of

said company where it passes through the identical tract he subsequently claimed as a settler. He was there at noon on April 22, and immediately afterward he moved his tent about 150 feet, to another point on the same quarter section just off the right of way. Prior to the date of the opening Smith had told his fellow workmen that he intended to settle upon and claim *that identical quarter* on which he was stopping. The railroad company, so far from requiring him to remain inside the territory, had issued a notice to its employees, warning all of them that expected to enter lands to go outside before the hour of opening, and Smith's attention had been called to this notice. He disobeyed the requirement of his employers and remained in the country. No duty to the public or even to private interests required his presence inside at the hour of opening. He was within both the letter and the spirit of the act by actually occupying the land he claimed, with intention to claim it, prior to the hour of opening. Here was not only *advantage*, but *undue* advantage. It was this kind of a case that was before this court when that opinion was rendered.

We need not recapitulate the facts in the case at bar. Payne was necessarily within the Territory. He was on the "Government acre" which was not among the lands opened to entry that day. He was not upon the quarter he subsequently entered. He had no opportunity to go outside of the lines. He knew of and relied upon the opinions and assurances expressed by the officers at the head of the Land Department of the Government, in advance of the opening, to the effect that his being within the country in the discharge of official duties would not disqualify him. He had not selected nor been upon the quarter he entered nor any other quarter with a view to claiming it prior to the

hour of opening. The facts are so different as to require the application of different rules of law to them.

The general language used in the opinion in Smith vs. Townsend, of course, includes Payne. It also includes Dunham and Bickford, in the recent decisions of the Department, *supra*, distinguishing those cases from Smith's. Payne's case, we submit, is distinguishable on much more logical grounds than Bickford's, as already indicated in what we have said heretofore.

The decision in Smith's case furnishes a precedent in another case only so far as the facts are substantially the same. Rulings of courts are considered always in reference to the facts before the court and general expressions or broad statements which go beyond the particular case before the court are not to be regarded as controlling the judgment in a later case involving the very point. The reason for this rule is very sound and is best stated by Chief Justice Marshall in the leading case of Cohens vs. Virginia, 6 Wheat., 264, where he says (op. at p. 399):

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In United States vs. Bank of United States, 5 How., 382, it was held that only the question raised and de-

cided by the court from which the case is brought to this court can be decided here.

In Gaines vs. Hennen, 24 How., 553, it was said:

"The rulings of courts must be considered always in reference to the subject matter of litigation and the attitude of parties in relation to the point under discussion."

In Carroll vs. Carroll, 16 How., 275, the question is carefully discussed as to how far the ruling of a court is to be recognized as a precedent, and it is there said:

"And therefore this court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

These rulings should be applied to the opinion in Smith vs. Townsend. It was unnecessary to the conclusion reached in that case to declare in sweeping terms that mere bodily presence in the territory opened to settlement on April 22, 1889, without regard to the purpose or character of such presence, operated, *per se*, to disqualify the party. Smith's presence was, under the facts found by the court on an agreed statement and set out in the beginning of the opinion, clearly a violation of the law. He not only was not required to be present by any command of his employers or duty to them or to the public, but he had been expressly notified by the railroad company to go outside if he wanted to claim a homestead. Not only so, but Smith was upon the identical quarter he attempted to claim in advance of the hour of opening, with the fully formed intention of claiming that land. He was clearly within the letter and spirit of the acts of both March

1, 1889, and March 2, 1889, and there was no ground on which to base a claim that he was excepted from the language of the act. He was one of the very parties against whom the inhibition of the act was directed.

Payne's case, as we have seen, is fundamentally different. We will not repeat the facts in the case at bar, for the court will bear them in mind. We ask that our proposition to the effect that Payne's case should be declared an exception to the statute be carefully considered. As we have seen, the Secretary of the Interior has, in two decisions rendered since the ruling in Smith vs. Townsend, recognized two classes of persons in the Territory at the hour of opening as exceptions to the general language of the act of Congress, to-wit: 1. Those who were not at the time qualified in some other respect, but who became qualified afterward. 2. Those who did not attempt to settle or enter lands on the day of opening. It is quite clear that the Secretary believed that the broad and general language used by this court in Smith's case was not binding upon him. Otherwise, it would be impossible for him to avoid its effect. The closing declaration in that opinion is, "one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein."

We again call attention to the fact that when the chief justice of the Oklahoma supreme court who prepared the opinion of that court in Smith vs. Townsend came to fully and carefully consider Payne's case when it came before him in the district court, he held that the latter should be distinguished from the former, but was required to follow the ruling of the supreme court in his conclusion, with a view to modifying the sweeping, general language in Smith's case,

when the Payne case should reach the territorial supreme court. Before Payne's case could be decided there, however, this court had, on April 3, 1893, affirmed the decision in Smith vs. Townsend without modification. The result was the supreme court of the Territory affirmed the decision of the district court against Payne, remarking that his case was "*somewhat* like" that of Smith vs. Townsend. It is quite apparent that the judges below had modified their views of the law very materially, and that our case would have been distinguished from Smith's but for the general language used by this court in affirming the decision in the Smith case.

On this whole case, then, we ask that the decision appealed from be reversed, with instructions to direct the district court to overrule the demurrer.

Respectfully submitted,

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